

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-1942

B
p/s

United States Court of Appeals

For the Second Circuit.

MARTINO LIEGGI,
Plaintiff-Appellant,

against

REEDER-UNION AG,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

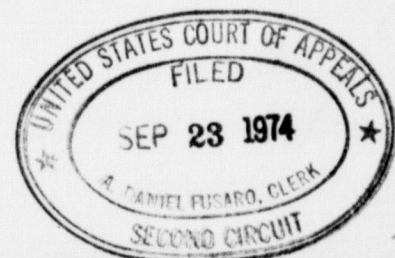
APPENDIX.

ZIMMERMAN & ZIMMERMAN,
Attorneys for Plaintiff-Appellant,
160 Broadway,
New York, N. Y. 10038

BURLINGHAM UNDERWOOD & LORD,
Attorneys for Defendant-Appellee,
25 Broadway,
New York, N. Y. 10004

THE REPORTER COMPANY, INC., New York, N. Y. 10007-212 732-6978-1974

(4405)



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PAGINATION AS IN ORIGINAL COPY

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1a

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

-----X

MARTINO LIEGGI,

Plaintiff-Appellant,

against

REEDER-UNION AG,

Defendant-Appellee,

On Appeal from the United States District Court for
the Southern District of New York.

-----X

RELEVANT DOCKET ENTRIES.

Date

1970

Sept. 9 Filed complaint and issued summons.

Sept. 10 Filed Certificate of Mailing summons and
complaint by registered mail, return receipt
requested addressed to:

Reeder-Union A. G.
Holstenbrucke 2
23 Kiel, Germany

Reg. Receipt #317318.

REG. MAIL RECEIPT #317318 RETURNED UNDELIVERED

RELEVANT DOCKET ENTRIES

Date

1973

July 9 Filed Certificate of Mailing Summons & Complaint by Registered Mail, RR Req to:

 REEDER-UNION A. G.
 Holstenbrucke 2
 23 Kiel, Germany

 Receipt No. 453428

Aug. 20 Filed Deft. "ANSWER" by attys. Burlingham, Underwood & Lord answering Pltff's complaint

1974

Jan. 8 Filed affdvt. and defts. notice of motion to dismiss action. - ret. 1-18-74

Jan. 25 Filed plaintiffs statement under Rule 9(g)

Feb. 19 Filed memo endorsed on defts. motion filed on 1-8-74: Motion to dismiss referred to Magistrate Raby to hear and report - Gurfein, J. m/n

Feb. 19 Filed pltf's affdvt. of Martin M. Baxter in opposition to deft's motion to dismiss.

Feb. 20 Filed deft's statement under Rule 9(g)

Jun. 7 Filed Report of Magistrate Raby.

Jun. 7 Filed MEMORANDUM-ORDER that upon a review of the Magistrates report and the record as a whole, I agree with his recommendations, Defendants motion to dismiss, pursuant to Fed. R. Civ. P. 41(b) is granted. - Gurfein, J. m/n

July 2 Filed pltf's notice of appeal to the USCA from the order of June 7-74 granting deft's motion dismissing pltf's complaint (pur. to rule 41(b)). Copies mailed.

3a

SUMMONS.

UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

-----X

MARTINO LIEGGI,

Plaintiff,

v.

REEDER-UNION A. G.,

Defendant,

Civil Action File No. 70 CIV 3919.

-----X

To the above named Defendant:

You are hereby summoned and required to serve upon ZIMMERMAN & ZIMMERMAN, plaintiff's attorney, whose address is 160 Broadway, New York 38, N. Y., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court

Date:

Deputy Clerk

[Seal of Court]

COMPLAINT.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Plaintiff, complaining of the defendant above-named,
by ZIMMERMAN & ZIMMERMAN, his attorneys, respectfully
alleges, upon information and belief, as follows:

I. That at all the times herein mentioned, the
defendant was and is a foreign corporation.

II. That at all the times herein mentioned, plain-
tiff was and is a citizen and resident of the State of
New York.

III. That the matter in controversy, exclusive of
interest and costs, exceeds the sum of TEN THOUSAND
(\$10,000.00) DOLLARS.

IV. The defendant does not have a principal place
of business in the State of New York.

V. That at all the times herein mentioned and for
some time prior thereto, the defendant was the owner of
the vessel, the M. V. DAMASKUS.

VI. That at all the times herein mentioned and
prior thereto, the defendant manned said vessel and its
master, officers and crew were on board said vessel and
in possession of same.

COMPLAINT

VII. That at all the times herein mentioned and prior thereto, the defendant managed, operated, maintained and controlled said vessel.

VIII. That at all the times herein mentioned, said M. V. DAMASKUS was docked at the 21st Street Pier, in the Borough of Brooklyn, City and State of New York, and stevedoring work was being performed thereon.

IX. That at all the times herein mentioned, said stevedoring work on said vessel was being performed by INTERNATIONAL TERMINAL OPERATING CO., INC., pursuant to agreement with the defendant or its agents.

X. That at all the times herein mentioned, said stevedoring work was being performed on said vessel under the general supervision and direction of the defendant, its agents, employees, the master, officers and crew of said vessel.

XI. That at all the times herein mentioned and pursuant to said agreement as and between defendant and INTERNATIONAL TERMINAL OPERATING CO., INC., said stevedoring work included the rigging and erection of a certain night tent at the #3 Hatch of said vessel, M. V. DAMASKUS.

XII. That at all the times herein mentioned and for some time prior thereto, defendant was the owner of said night tent herein mentioned.

COMPLAINT

XIII. That at all the times herein mentioned and for some time prior thereto, defendant maintained said night tent, as well as the rope, wires and cables necessary to rig said night tent and sustain same aloft.

XIV. That at all the times herein mentioned, the work of rigging said night tent at the #3 Hatch of the M. V. DAMASKUS was being performed on said vessel under the general supervision and direction of the defendant, its agents, employees, its master, officers and crew on board said vessel.

XV. That at the time herein mentioned, defendant supplied and provided the said night tent and the rope, wire and cables with which to rig and secure same.

XVI. That at all the times herein mentioned, said night tent and the rope, wire and cables supplied by the defendant were each respectively in a dangerous, defective and hazardous condition, not suitable or safe for use, and the defendant so maintained, supplied and provided same for use by the longshoremen.

XVII. That on the 9th day of January, 1968, while the longshoremen employees of said INTERNATIONAL TERMINAL OPERATING CO., INC., including the plaintiff herein, were each on board said vessel, M. V. DAMASKUS, and engaged in rigging said night tent at said #3 Hatch of said

COMPLAINT

vessel, the plaintiff herein was caused to suffer and sustain severe personal injury while handling a certain dry, rough, frayed and/or burred wire, rope and/or cable.

XVIII. That the said accident was caused by reason of the unsafe and unseaworthy condition of said vessel and by reason of the carelessness and negligence on the part of the defendant, its agents, servants, employees, the master, officers and crew of said vessel, without any contributing fault or lack of care on the part of the plaintiff; in that defendant herein failed to supply plaintiff with a safe place to work; failed to maintain, supply and provide suitable and safe gear, night tent, rope, wire, cable, appurtenances, appliances and equipment for use by longshoremen, including the plaintiff; failed and neglected to keep said vessel in a safe and seaworthy condition; failed to make due, timely and proper inspection of the night tent, rope, wire, cable, appurtenances, appliances and equipment prior to supplying and providing same for use by longshoremen, including the plaintiff and his co-workers, in the performance of the work at hand; failed to employ a sufficient number of experienced and skilled employees and supervisors; so maintained said gear, night tent, rope, wire, cable, appurtenances, appliances and equipment in a dangerous

COMPLAINT

and hazardous condition so that each was not suitable or safe for use by longshoremen, and such unsuitability caused the very accident complained of herein; unnecessarily exposed the plaintiff to harm and to the very accident complained of, which was foreseeable; failed to warn the plaintiff of the dangerous condition of its gear, night tent, rope, wire, cable, appurtenances, appliances and equipment; failed to remedy or repair said conditions complained of and improperly directed and permitted the plaintiff to use same in the work at hand; permitted said vessel to be, become and remain unsafe and unseaworthy and so maintained same; failed to avoid said accident, although they had reasonable opportunity to do so; and in that defendant was careless and negligent in other respects in the premise herein, and its vessel, the M. V. DAMASKUS, was otherwise unseaworthy.

XIX. That as a result thereof, the plaintiff sustained certain severe personal injuries, both internal and external, to divers parts of his arms, head, legs and body, and he was made sick, sore, lame and disabled and suffered a severe shock to his nervous system, and plaintiff believes that some of the injuries he sustained may remain permanent.

COMPLAINT

XX. That plaintiff was compelled to expend divers sums of money for medical aid and attention in the endeavor to cure himself of the injuries he sustained and may in the future be compelled to expend further sums of money for such purpose, and plaintiff was and may in the future be unable to pursue his usual vocation, to his damage.

XXI. That by reason of the premises, plaintiff has sustained damage in the sum of TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS, besides the costs and disbursements of this action.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
Borough of Manhattan
160 Broa
City of New York (38)

CERTIFICATE OF MAILING.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GARTINO LIEGGI

PLTFF.

VS

REEDER-UNION A.G.,

Defts.



CERTIFICATE OF MAILING

70 Civ 3919

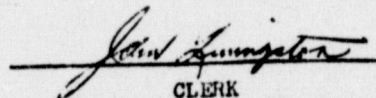
I, JOHN LIVINGSTON, Clerk of the United States District Court for the Southern District of New York, do hereby certify that on the 9 day of Sept. , 1970, I served the complaint and summons filed and issued herein on the 9th day of Sept. , 1970, by mailing by registered mail, return receipt requested, at the United States Post Office, Church Street Station, New York, N.Y., a copy of each thereof, securely enclosed in a postpaid wrapper, addressed to:

REEDER-UNION A.G.
HOLSTENBRUCKE 2
23 KIEL
GERMANY

and that annexed to the original hereof is registered mail receipt No. 317318 (Church Street Station) which was issued at my request as aforementioned.

Dated: New York, N.Y.

Sept. 9th , 19 70


CLERK

11a

CERTIFICATE OF MAILING

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 .

I received this summons and served it together with the complaint herein as follows:

FORT 12 AND FIVE SAID
IN THE STATES COURTS

RECEIVED

(A.R.)

RECEIVED

RECEIVED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NEW YORK, N. Y. 10007

12a

CERTIFICATE OF MAILING

ED NO. 317310		POSTMARK OF CHURCH ST. STA. NEW YORK, N.Y. SEP 9 1910 U.S.P.
Special Delivery	\$	
Return Receipt	\$	
Restricted Delivery	\$	
<input type="checkbox"/> AIRMAIL		MAILING OFFICE
BY <i>C. E. H.</i>		
<i>F. District Court</i>		
<i>S. Court House Foley St.</i>		
<i>Box 10007</i>		
<i>ceder - Union H.G.</i>		U.S.P.O. 1000-335-107
<i>Kalstengrube 2</i>		
<i>Kiel Germany</i>		

Registered article: (1)
 1. *Objet* *Registered article*
 2. *Marque* *Mark*
 3. *Numéro* *Number*
 4. *Adresse* *Address*
 5. *Provenance* *Provenance*
 6. *Quantité* *Quantity*
 7. *Contenance* *Content*
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14a

CERTIFICATE OF MAILING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTINO LIEGGI

Plaintiff

vs

REEDER-UNION A.G.

Defendant

70 Civ 3919

CERTIFICATE OF MAILING

FILED
U.S. DISTRICT COURT
JUL 9 3 59 PM '73
S.D.N.Y.

I, RAYMOND F. BURCHARDT, CLERK of the United States District Court
for the Southern District of New York, do hereby certify that on the
6th day of July 1973, I served the complaint and
summons filed and issued herein on the 3rd day of July, 1973
by mailing by registered mail, return receipt requested, at the United
States Post Office, ~~Church Street~~ ^{Chinatown} Station, New York, N.Y. a copy of
each thereof, securely enclosed in a postpaid wrapper, addressed to:

REEDER-UNION A.G.
HOLSTENBRUCKE 2
23 KIEL, GERMANY

and that annexed to the original hereof is registered mail receipt No.
453428 ^{Chinatown} ~~(Church Street~~ Station) which was issued at my
request as aforementioned.

Dated: New York, N.Y.

July 6, 1973

Raymond F. Burchardt
CLERK

15a

CERTIFICATE OF MAILING

Registered article ☐ Letter ☐ Print ☐ Other
 Envoi recommandé Lettre Livre Brochure Autre

☐ Insured parcel ☐ Insured value
 Colis avec valeur déclarée Valeur déclarée

Office of mailing Bureau de dépôt Date of mailing Date de dépôt No. 453428

Addressee (Name or firm) Nom ou raison sociale du destinataire
 REEDER-UNION A.G.

Street and No. Rue et No.
 HALSTEDBRUCKE 2

Place and country Lieu et Pays
 23 KIEL, W. GERMANY

This receipt must be signed by the addressee or by a person authorized to do so by virtue of the regulations of the country of destination, or, if those regulations so provide, by the employee of the office of destination, and returned by the first mail directly to the sender.
 Cet avis doit être signé par le destinataire ou par une personne y autorisée en vertu des règlements du pays de destination, ou, si ces règlements le comportent, par l'agent du bureau de destination, et renvoyé par le premier courrier directement à l'expéditeur.

☐ The article mentioned above was duly delivered.
 L'envoi mentionné ci-dessus a été dûment livré.

Signature of the addressee Signature du destinataire
 Lotter

Signature of the employee of the office of destination Signature de l'agent du bureau de destination
 16/2 vzw P Ber.

Postmark of the office of destination
 Timbre et date du bureau de destination
 16-73-12

REGISTERED NO. 453428 POSTMARK OF NEW YORK JUL 6 1973 MAILING OFFICE

Value \$ 11	Special Delivery \$
Reg. Fee \$ 9	Return Receipt \$ 3
Handling Charge \$	Restricted Delivery \$
Postage \$ 63	<input type="checkbox"/> AIRMAIL

POSTMASTER (By) [Signature]

FROM
 Zimmermann & Zimmermann
 160 Broadway
 New York 10038

TO
 Reeder-Union A.G.
 Halstedbrücke 2
 23 Kiel Germany

16a

CERTIFICATE OF MAILING

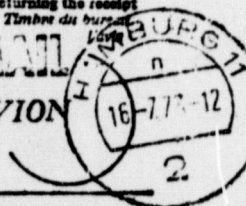
POSTAL SERVICE OF THE UNITED STATES OF AMERICA

Administration des Postes des Etats-Unis d'Amérique

Postmark of the office
returning the receipt
Timbre du bureau

AIR MAIL

PAR AVION



POSTAL SERVICE

Service des postes

RETURN RECEIPT

Avis de réception

The receipt is
returned by
it, put on it
"Recevoir"

To be filled out by the sender, who will indicate his address for the return of this receipt.
A remplir par l'expéditeur, qui indiquera son adresse pour la renvoi du présent avis.

Name or firm *CLERK, U.S. DISTRICT COURT* Nom ou raison sociale
U.S. COURTHOUSE, FOLEY SQUARE
 Street and No. *NEW YORK, N.Y. 10007* Rue et no.
 City, State and Zip Code *NEW YORK, N.Y. 10007* Localité

UNITED STATES OF AMERICA

Etats-Unis d'Amérique

Form 3865, July 1971

70 Cr 3919

REGISTERED NO.

453428

POSTMARK OF

Value \$ <i>M</i>	Special Delivery \$
Reg. Fee \$ <i>45</i>	Return Receipt \$ <i>35</i>
Handling Charge \$	Restricted Delivery \$
Postage \$ <i>63</i>	<input checked="" type="checkbox"/> AIRMAIL
POSTMASTER (U.S.) <i>m.b.</i>	



FROM *Zimmerman - Zimmerman*
160 Broadway
N.Y.C. 10038
 TO *Reeher - Dupon*
Halesbury
23 New St

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17a
ANSWER

- - - - - X
MARTINO LIEGGI, :
Plaintiff,:
- against - : 70 Civil 3919 MIG
REEDER-UNION AG, : ANSWER
Defendant.:
- - - - - X

Defendant, by its attorneys Burlingham Underwood & Lord, answering plaintiff's complaint, states upon information and belief:

1. Denies the allegations of paragraph I, except admits that defendant was a foreign corporation.
2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs II, III, VIII, IX, XI, XII, XIII, XV, XVII, and XX.
3. Admits the allegations of paragraph IV.
4. Denies the allegations of paragraphs V, VI, and VII, except admits that on January 9, 1968 defendant owned, manned, possessed, managed, operated, maintained, and controlled M/V DAMASKUS, except insofar as the vessel, portions thereof, her appurtenances, gear, etc., were manned, possessed, managed, operated, maintained, and controlled by others, and except insofar as the Master, Officers, and crew were temporarily ashore.

ANSWER

5. Denies the allegations of paragraphs X, XIV, XVI, XVIII, XIX, and XXI.

6. The injuries and damages complained of, if any, were caused or contributed to by plaintiff's negligence or by the negligence, fault, breach of contract, or breach of warranty of and by persons for whose conduct defendant is not liable.

7. The Court lacks personal jurisdiction of defendant.

8. The process and service of process on defendant are insufficient.

9. The action is time barred by statute of limitations, laches, or both.

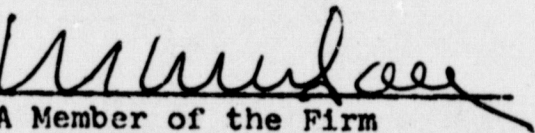
10. The suit should be dismissed under F.R.Civ.P. 41(b).

11. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant demands judgment dismissing the complaint, with its costs and disbursements.

BURLINGHAM UNDERWOOD & LORD
Attorneys for Defendant

By


A Member of the Firm
25 Broadway
New York, New York 10004
HANOVER 2 - 7585

NOTICE OF MOTION.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

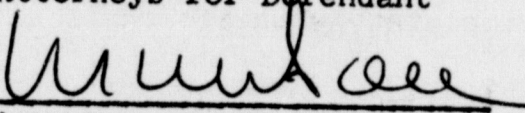
----- X
MARTINO LIEGGI, :
Plaintiff, :
- against - : 70 Civil 3919 MIG
REEDER-UNION AG, : NOTICE OF MOTION
Defendant. :
----- X

PLEASE TAKE NOTICE that upon the annexed affidavits of Horst Meyer, G. J. Sottung, and William M. Kimball and all papers and proceedings heretofore filed or had herein, the undersigned will move on January 18, 1974 at 10 A.M. in Room 2904 of the Court House pursuant to F.R.Civ.P. 41(b), 56(b) to dismiss this action for plaintiff's failure to prosecute and for laches.

New York, New York
January 7, 1974

Yours, etc.,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Defendant

By 
A Member of the Firm
25 Broadway
New York, New York 10004

T O : MESSRS. ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

AFFIDAVIT OF WILLIAM M. KIMBALL IN SUPPORT OF MOTION.
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- X
MARTINO LIEGGI, :
Plaintiff, :
- against - : 70 Civil 3919 MIG
REEDER-UNION AG, :
Defendant. :
----- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILLIAM M. KIMBALL, being duly sworn, deposes and
says:

1. I am a member of Burlingham Underwood & Lord
attorneys for defendant, and personally know the truth of the
following:

2. As alleged in plaintiff's complaint, this is
a diversity action by a New York longshoreman to recover
damages for injury allegedly sustained aboard defendant's
ship at 21st Street Pier, Brooklyn on January 9, 1968.

3. Defendant's answer specially pleads defenses
of insufficient service of process and laches and prays for
dismissal under F.R.Civ.P. 41(b).

4. As shown by the Court's docket sheet, the
complaint was filed and summons issued on September 9, 1970,
2 years and 8 months after the alleged accident date. As

AFFIDAVIT OF WILLIAM M. KIMBALL IN SUPPORT OF MOTION stated in paragraphs 2 and 3 of the annexed affidavit of Horst Meyer, by September 9, 1970 defendant had, in effect, been merged into another company and no longer had any office or place of business at Holstenbruck 2, 23 Kiel, Germany.

5. As shown by the Court docket sheet, in September 1970 plaintiff attempted to serve process on defendant by registered mail but the receipt was returned undelivered.

6. According to the Court's docket sheet, plaintiff made no further effort to serve process on defendant until July 1973, 5-1/2 years after the alleged accident date.

7. As shown by the mailing envelope and contents in my firm's file, on July 6, 1973 plaintiff sent an unsigned summons dated July 3, 1973 and copy of the unsigned complaint by registered air mail, certificate 453428, addressed to defendant at its no longer existing place of business in Kiel, and the envelope and contents were forwarded to the successor company in Hamburg where they were received on July 16, 1973.

8. As stated in paragraphs 4 and 9 of the annexed affidavit of Horst Meyer, by July 16, 1973 defendant no longer owned the ship on which plaintiff was allegedly injured or employed the men who were officers of that ship on the date of plaintiff's alleged injury.

AFFIDAVIT OF WILLIAM M. KIMBALL IN SUPPORT OF MOTION

9. Plaintiff's complaint alleges that his injury was caused by a defective night tent owned and furnished by defendant. Defendant's answer denies knowledge or information sufficient to form a belief as to whether defendant owned or furnished any night tent. As stated in paragraph 11 of the annexed affidavit of Horst Meyer and in paragraph 4 of the annexed affidavit of G. J. Sottung, defendant has no record of any such night tent.

10. As stated in paragraph 8 of the annexed affidavit of Horst Meyer and in paragraph 2 of the annexed affidavit of G. J. Sottung, prior to July 16, 1973 receipt of the unsigned summons and complaint mentioned in paragraph 7 of this affidavit, neither defendant nor anyone on its behalf had any notice of plaintiff's alleged January 9, 1968 injury.

11. As stated in paragraph 9 of the annexed affidavit of Horst Meyer and in paragraph 3 of the annexed affidavit of G. J. Sottung, neither defendant nor anyone on its behalf has any independent knowledge of the circumstances of plaintiff's alleged January 9, 1968 injury.

WHEREFORE, deponent prays that defendant's motion to dismiss be granted.

(Sworn to by William M. Kimball, January 7, 1974.)

- - - - - X

MARTINO LIEGGI, :

Plaintiff, :

- against - : 70 Civil 3919 MIG

REEDER-UNION AG, :

Defendant. :

- - - - - X

FEDERAL REPUBLIC OF GERMANY }
LAND OF HAMBURG }
CITY OF HAMBURG }
CONSULATE GENERAL OF THE : SS.:
UNITED STATES OF AMERICA }

HORST MEYER, being duly sworn, deposes and says:

1. On January 9, 1968 and continuously until 1973 I was with the Pacific Freight Department of Hamburg-Sud, which Department on January 9, 1968 and at all material times operated M/V DAMASKUS as agents for defendant Reeder-Union AG and Dr. August Oetker Schiffahrts- und Betelligungsgesellschaft mbH.
2. Before September 9, 1970 Reeder-Union AG had, in effect, merged into Dr. August Oetker Schiffahrts.
3. Before September 9, 1970 Reeder-Union AG had ceased to have any office or place of business at Holstenbruck 2, 23 Kiel, Germany.
4. Before July 9, 1973 M/V DAMASKUS was sold to Panamanian owners who registered the vessel under Greek flag.

AFFIDAVIT OF HORST MEYER IN SUPPORT OF MOTION

5. When Reeder-Union AG owned M/V DAMASKUS, including on January 9, 1968, that vessel's Officers were at all times under orders to promptly notify their superiors of all actual or claimed shipboard injuries to longshoremen in U.S. ports which came to the Officers' attention either directly or by written or oral report of others.

6. When Reeder-Union AG owned M/V DAMASKUS, including on January 9, 1968, that vessel's Master and Chief Officer were at all times under orders to make contemporaneous entries in the vessel's deck log book of all actual or claimed observed or reported shipboard injuries to longshoremen in U.S. ports which came to their attention either directly or by written or oral report of others.

7. As confirmed by absence of any such entry in the deck log book of M/V DAMASKUS under date of January 9, 1968 (copy of which is attached) and for 6 weeks before and after that date, no actual or claimed injury in the Port of New York to longshoreman Martino Lieggi was ever brought to the attention of the Master, Chief Officer, or any other Officer of M/V DAMASKUS.

8. Neither Reeder-Union AG nor Dr. August Oetker Schiffahrts nor anyone on behalf of Reeder-Union AG had any notice whatsoever of any January 9, 1968 or other claimed injury to plaintiff Martino Lieggi until July 16, 1973.

AFFIDAVIT OF HORST MEYER IN SUPPORT OF MOTION

9. Neither Reeder-Union AG nor Dr. August Oetker Schiffahrts nor anyone on behalf of Reeder-Union AG has any independent knowledge whatsoever of the circumstances of any January 9, 1968 or other claimed injury to plaintiff Martino Lieggi.

10. Neither the Master, Chief Officer, nor any other Officers who served aboard M/V DAMASKUS on January 9, 1968 is still serving aboard that vessel and none of those persons is any longer in the employ of Reeder-Union AG or Dr. August Oetker Schiffahrts.

11. Neither Reeder-Union AG nor Dr. August Oetker Schiffahrts nor any other known entity has any record whatsoever concerning the night tent upon which plaintiff's complaint is based.

12. Due to passage of time, Reeder-Union AG is incapable of affirmatively defending itself against the merits of plaintiff's claim.

WHEREFORE, deponent prays that defendant's motion to dismiss be granted.

(Sworn to by Horst Meyer, November 23, 1973.)

AFFIDAVIT OF G. J. SOTTUNG IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MARTINO LIEGGI, :
 :
 Plaintiff, :
 :
 - against - : 70 Civil 3919 MIO
 :
 REEDER-UNION AG, :
 :
 Defendant. :
-----X

STATE OF NEW YORK)
 : ss.:
 COUNTY OF NEW YORK)

G. J. SOTTUNG, being duly sworn, deposes and says:

1. I am Vice-President Administration and Treasurer of Columbus Line, Inc., which on January 9, 1968 and at all material times were agents at New York for defendant Reeder-Union AG and M/V DAMASKUS.

2. Neither Columbus Line, Inc. nor anyone on its behalf had any notice whatsoever of any January 9, 1968 or other claimed injury to plaintiff Martino Lieggi until July 16, 1973.

3. Neither Columbus Line, Inc. nor anyone on its behalf has any independent knowledge whatsoever of the circumstances of any January 9, 1968 or other claimed injury to plaintiff Martino Lieggi.

4. Neither Columbus Line, Inc. nor any other known entity has any record whatsoever concerning the night tent upon which plaintiff's complaint is based.

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AFFIDAVIT OF G. J. SOTTUNG IN SUPPORT OF MOTION

WHEREFORE, deponent prays that defendant's
motion to dismiss be granted.

(Sworn to by G. J. Sottung, November 23, 1973.)

GENERAL RULE 9(g) STATEMENT OF MATERIAL FACTS AS TO WHICH
THE OPPOSING PARTY PLAINTIFF CONTENDS THERE IS AN
ISSUE OF FACT TO BE TRIED.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

1. Whether prior to September 9, 1970 defendant had been merged into another company and ceased to have an office or place of business at HOLSTENBERUCK 2, 23 KIEL, Germany.
2. Denies that in September 1970 plaintiff attempted to serve process on defendant by registered mail but admits plaintiff caused the Clerk of this Court to do so.
3. Denies that on July 6, 1973 plaintiff sent a summons and complaint by registered air mail, certificate 453428, addressed to defendant at HOLSTENBERUCK 2, 23 KIEL, Germany but admits that plaintiff caused the Clerk of this Court to do so and further denies having any knowledge or information sufficient to form a belief as to whether said summons and complaint were unsigned.
4. Denies having any knowledge or information sufficient to form a belief as to the allegations of fact set forth in items numbered 8, 9 and 10 of defendant's Rule 9 (g) statement.

GENERAL RULE 9(g) STATEMENT OF MATERIAL FACTS AS TO WHICH
THE OPPOSING PARTY PLAINTIFF CONTENDS THERE IS AN
ISSUE OF FACT TO BE TRIED

5. Denies the allegations of fact set forth in
items numbered 12, 13 and 14 of defendant's said state-
ment.

DATED: New York, New York
January 25, 1974

Respectfully submitted,

ZIMMERMAN & ZIMMERMAN

By:

A Member of the Firm
Attorneys for Plaintiff
Office & P. O. Address
160 Broadway
New York, New York 10038

TO:

BURLINGHAM, UNDERWOOD & LORD
Attorneys for Defendant
Office & P. O. Address
25 Broadway
New York, New York 10004

AFFIDAVIT OF MARTIN M. BAXTER IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York,
City of New York, ss:

MARTIN M. BAXTER, being duly sworn, deposes and
says:

I am an attorney associated with ZIMMERMAN & ZIMMERMAN, the attorneys for the plaintiff herein, am familiar with all the pleadings and proceedings heretofore had herein and make this affidavit in opposition to shipowner's motion to dismiss plaintiff's complaint.

At the outset it should be noted that on October 31, 1973 I appeared before Your Honor at a pretrial conference at which time shipowner's attorney was granted until December 31, 1973 to move to dismiss plaintiff's complaint for the various grounds advanced at said time. However, it was not until January 8, 1974 that shipowner's attorney served the instant motion by hand delivery and the original motion papers will so disclose. Thus, shipowner's attorney is in default in abiding by this Court's order and direction and for that reason alone, the instant motion should be denied.

AFFIDAVIT OF MARTIN M. BAXTER IN OPPOSITION TO MOTION

Furthermore, it should be noted that although shipowner served and filed its answer on or about August 20, 1973, the affidavit by HORST MEYER is dated November 23, 1973, almost a month and a half prior to the filing of the instant motion. There is no explanation whatsoever offered by shipowner or its attorney as to this inordinate delay in filing said motion.

As regards HORST MEYER'S affidavit, the same shall be dismissed as being completely self-serving. The most glaring self-serving statements are those at page 2 and 3 of his affidavit where in substance he swears that the vessel's officers are under orders to promptly notify their supervisors regarding ship board accidents (Para. 5), that no entry was made in the deck log (Para. 6) which providently shipowner still has but apparently nothing else, not even stevedore reports which by contract *must* be forwarded to shipowner or its agents, plus detentions, billings, etc.

However, we have only an affidavit before us which can not be cross-examined. If as a matter of fact there was a rigid rule re accidents, then and in that event plaintiff has the right to subject such HORST MEYER to cross examination so that the truth of the matter can

AFFIDAVIT OF MARTIN M. BAXTER IN OPPOSITION TO MOTION

be established. Any affidavit submitted on a motion such as this is suspect especially when it merely alleges gratuitous conclusions helpful to shipowner.

Again in said affidavit there is much talk of elapsed time. However, this Court should keep its eye on the ball and appreciate that the Congress of this great country of ours has seen fit in its legislative powers to provide a three year Statute of Limitation on cases such as this. The fact that the accident occurred on January 9, 1968 and that the complaint was filed on September 9, 1970 and process was issued by long arm New York Statute on September 10, 1970 by the Clerk of this Court directed to Reeder-Union A.G., Holsterbrucke 2, 23 Kiel, Germany was the exact same address that was used on the second service of the long arm New York Statute process by the Clerk of this Court on July 9, 1973 which process resulted in shipowner filing its answer on August 20, 1973.

All the misstatements of fact to the contrary, the defendant not only was apprized of this action by service of process herein on July 9, 1973, as evidenced by its answer, but no acceptable reason is given for the fact that shipowner ignored the first service of process by the Clerk of this Court although it responded immediately to the process some three years later.

AFFIDAVIT OF MARTIN M. BAXTER IN OPPOSITION TO MOTION

Again, it should be noted the explicit and artful words employed by shipowner's attorney in framing the affidavit for HORST MEYER'S signature. In Paragraph 2 said affidavit says explicitly that the named defendant was, *IN EFFECT*, merged into another entity. Indeed, even in his own affidavit shipowner's attorney in Paragraph 4 stated defendant "had, *IN EFFECT*, been merged" into another entity. However, plaintiff can not establish the truth or falsity of said allegations without cross examining the affiant or affiants. Plaintiff is in complete ignorance of said merger and is entitled to cross examine defendant as to the truth and veracity of said statements. It is submitted that at least on that factual issue a hearing should be held to establish the truth or falsity of such a pivotal issue of fact. An affidavit or affidavits alone are not sufficient.

In the instant case, defendant by delaying its answer from 1970 until the service of the second process has affected plaintiff's rights irreparably and has not been honest with the Court or the plaintiff. If the instant motion were to be granted an injustice will have been perpetrated on the plaintiff and this Court. Such actions on the part of defendant or its attorney should not be encouraged and this Court should not lend itself to such scheme.

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AFFIDAVIT OF MARTIN M. BAXTER IN OPPOSITION TO MOTION

In the interest of justice the instant motion should be denied.

(Sworn to by Martin M. Baxter, January 16, 1974.)

GENERAL RULE 9(g) STATEMENT OF MATERIAL FACTS AS TO WHICH
THE MOVING DEFENDANT PARTY CONTENDS THERE IS NO ISSUE
TO BE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

1. This is a diversity action by a New York longshorman to recover damages for an injury allegedly sustained aboard defendant's ship at 21st Street Pier, Brooklyn, on January 9, 1968.

2. Defendant's answer specially pleads defenses of insufficient service of process and laches and prays for dismissal under F. R. Civ. P. 41(b).

3. The complaint was filed and summons issued on September 9, 1970, 2 years and 8 months after the alleged accident date.

4. By September 9, 1970 defendant had, in effect, been merged into another company and no longer had any office or place of business at Holstenberuck 2, 23 Kiel, Germany.

5. In September 1970 plaintiff attempted to serve process on defendant by registered mail but the receipt was returned undelivered.

6. Plaintiff made no further effort to serve process on defendant until July 1973, 5-1/2 years after the alleged accident date.

GENERAL RULE 9(g) STATEMENT OF MATERIAL FACTS AS TO WHICH
THE MOVING DEFENDANT PARTY CONTENTS THERE IS NO ISSUE
TO BE

7. On July 6, 1973 plaintiff sent an unsigned summons dated July 3, 1973 and copy of the unsigned complaint by registered air mail, certificate 453428, addressed to defendant at its former place of business in Kiel.

8. The envelope and contents referred to in the immediate preceding paragraph were forwarded to a successor company of defendant in Hamburg where the envelope and contents were received on July 16, 1973.

9. By July 16, 1973, defendant no longer owned the ship on which plaintiff was allegedly injured or employed the men who were officers of that ship on the date of plaintiff's alleged injury.

10. Plaintiff's complaint alleges that his injury was caused by a defective night tent owned and furnished by defendant.

11. Defendant does not know at this time whether it owned or furnished any night tent and defendant has no record of any such night tent.

12. Prior to July 16, 1973, neither defendant nor anyone on its behalf had any notice of plaintiff's alleged January 9, 1968 injury.

13. Neither defendant nor anyone on its behalf has any independent knowledge of the circumstances of plaintiff's alleged January 9, 1968 injury.

**GENERAL RULE 9(g) STATEMENT OF MATERIAL FACTS AS TO WHICH
THE MOVING DEFENDANT PARTY CONTENTS THERE IS NO ISSUE
TO BE**

14. Due to passage of time, defendant is incapable of affirmatively defending itself against the merits of plaintiff's claim.

DATED: New York, New York
January 21, 1974

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Defendant

By
A Member of the Firm
25 Broadway
New York, New York 10004

TO:

MESSRS. ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038
Attention: Martin M. Baxter, Esq.

REPORT OF UNITED STATES MAGISTRATE HAROLD J. RABY.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

TO THE HONORABLE MURRAY I. GURFEIN, U.S.D.J.:

This report relates to a motion by attorneys for defendant to dismiss this action, pursuant to Federal Rule 41(b) for failure to prosecute and for laches. The motion was referred by you to me to hear and report by memorandum endorsement dated February 19, 1974.

This is a diversity action by a New York longshoreman to recover damages for an injury allegedly sustained aboard defendant's ship while said ship was moored at a pier in Brooklyn, N. Y. on January 9, 1968.

This suit was commenced by the filing of a complaint and issuance by the Clerk of this Court of a summons as of September 9, 1970 some 2 years and 8 months after the alleged accident date.

Apparently, following the issuance of the summons, the United States Marshal attempted to effectuate the service of process by registered mail addressed to the defendant at its alleged residence in Germany. However, the attempt at service proved abortive, the envelope being returned to the Marshal as being undeliverable.

REPORT OF UNITED STATES MAGISTRATE HAROLD J. RABY

Following that event, apparently plaintiff made no further effort whatsoever to serve process on the defendant until July 1973, some 5 1/2 years after the alleged accident date.

Defendant, in addition to asserting a claim of insufficiency of service of process in the answer to the complaint, has, as hereinabove stated, moved to dismiss this action for non-diligent prosecution and for laches. In my opinion, this motion is well-founded and should be granted.

We are not, of course, dealing with any statute of limitations problem as such, but purely with the problem of whether or not prosecution of this matter has been unduly delayed, to the prejudice of the defendant.

While, as just stated, the issue here is not whether the statute of limitations has run, I think that some of the cases dealing with the impact of the statute of limitations in cases of late service of the summons are helpful to a resolution of the problem in this case.

Reference is made, for example, to the case of *Newhart v. Hellick Coffee Co.*, 325 Fed. Supp. 1047 (D.C. Pa. 1971), in which it is pointed out that while the filing of a complaint is sufficient to toll the running of the statute of limitations, the plaintiff must exercise

REPORT OF UNITED STATES MAGISTRATE HAROLD J. RABY

due diligence subsequently to perfect service of process, and the question as to whether such due diligence has been exercised is for the Court to determine in each case.

Similar guidance is found in the case of *McCrea v. General Motors*, 53 F.R.D. 384 (D.C. Mont. 1971) wherein it is stated that where a complaint is filed prior to the expiration of the statute of limitations, a failure to serve process until the expiration of the statute of limitations may, in an appropriate case, be treated as a failure to prosecute diligently.

See also *Haynes v. Druggists' Circular*, 32 Fed. 2d 215, 217 (C.A. 2, 1929), wherein it is aptly stated: "Negligence in the prosecution of a suit after its commencement should bar relief. Merely instituting a suit does not of itself relieve a person from the operation of the rule of laches; if he fails to prosecute his suit diligently it is the same as though no suit had been begun."

To me, it is absolutely inexcusable that the plaintiff, following the initial reported failure to effect valid service of process, failed to make any further effort to serve process until July 1973.

This delay might conceivably be excused if there were a clear showing of absence of prejudice to the

REPORT OF UNITED STATES MAGISTRATE HAROLD J. RABY

defendant caused by such delay. It is alleged, however, in the moving affidavits that neither defendant nor anyone on its behalf had any notice of the alleged 1968 accident; and it is also alleged that as of July 16, 1973 defendant no longer owned the ship on which plaintiff was allegedly injured or employed the men who were officers on the ship on the date of the alleged injury.

The opposing affidavit in effect expresses doubt as to the truth of the allegation by defendant that it had no notice of the accident and further points out that the action was commenced well within the three year limitations period provided by Congress.

Even accepting, *arguendo*, the plaintiff's assertion that the defendant may have had some notice of the accident (despite its denial thereof), the additional factor cited by defendant (not contradicted) to the effect that the vessel on which the alleged accident occurred is no longer owned by defendant, constitutes sufficient showing of prejudice to warrant the granting of its motion. For the reasons hereinabove stated, the plaintiff's claim that the complaint was filed prior to the expiration of the "three year statute of limitations on cases as this" is unavailing.

REPORT OF UNITED STATES MAGISTRATE HAROLD J. RABY

For the foregoing reasons, it is recommended that the motion to dismiss for non-diligent prosecution and for laches pursuant to 41(b) F.R.C.P., be granted, and that the complaint be dismissed, with prejudice and without costs.

Copies of this report have been mailed this date to counsel for the interested parties, who are hereby instructed that objections hereto must be filed at your chambers not later than ten days from the date hereof.

The following papers considered by me on this motion are returned herewith:

1. Plaintiff's notice of motion filed 1/8/74, with accompanying memo of law.
2. Plaintiff's Rule 9(g) statement filed 1/25/74.
3. Defendant's Rule 9(g) statement filed 2/20/74.
4. Opposing affidavit of Martin Baxter filed 2/19/74, with accompanying memo of law filed 2/19/74.

DATED: New York, N. Y.
June 4, 1974

Respectfully submitted,

HAROLD J. RABY
UNITED STATES MAGISTRATE

cc: Burlingham Underwood &
Lord, Esqs.
25 Broadway
New York, N. Y. 10004
Attention: William M. Kimball, Esq.

Zimmerman & Zimmerman, Esqs.
160 Broadway
New York, N. Y. 10038
Attention: Martin Baxter, Esq.

MEMORANDUM BY GURFEIN, D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

MARTINO LIEGGI,

Plaintiff,

-against-

70 Civ. 3919

REEDER-UNION AG,

Defendant.

- - - - - X

APPEARANCES

ZIMMERMAN & ZIMMERMAN
New York, N.Y.
Attorneys for Plaintiff

BURLINGHAM UNDERWOOD & LORD
New York, N.Y.
Attorneys for Defendant

GURFEIN, D.J.:

M E M O R A N D U M

This is a diversity action by a New York longshore-
man to recover damages for an injury allegedly sustained
aboard defendant's ship while she was moored at a pier in
Brooklyn on January 9, 1968 -- six years ago.

MEMORANDUM BY GURFEIN, D. J.

The suit was commenced by the filing of a complaint on September 9, 1970, some two years and eight months after the alleged accident occurred. Service on the defendant in Germany could not be effected. No further effort to serve process on the defendant was made until July, 1973, some 5-1/2 years after the alleged accident.

Defendant moved for an order pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, dismissing the action for failure to prosecute and for laches. I referred the motion to Magistrate Harold J. Raby, to hear and report. The hearing was held and a report made on June 4, 1974. The Magistrate's report concluded that the plaintiff's delay in bringing the action was prejudicial to the defendant and was inexcusable, and consequently recommended that the motion to dismiss for non-diligent prosecution and for laches be granted. See e.g., Oroz v. American President Lines, 259 F.2d 636, 640 (2 Cir. 1958); Murphy v. International Freighting Corp., 182 F. Supp. 636, 639-40 (D.C. Mass. 1960).

The Magistrate reports that neither the defendant nor anyone on its behalf had any notice of the alleged 1968 accident. By the time service was made in July 1973,

MEMORANDUM BY GURFEIN, D. J.

the defendant no longer owned the ship nor were its officers any longer in its employ.

The question whether laches should bar the suit is addressed to the sound discretion of the trial court. Gardner v. Panama R. Co., 342 U.S. 29, 30 (1951). Defendant having had a hearing before Magistrate Raby and an opportunity to submit papers which might have justified the delay, compare Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 533-34 (1955), failed to do so in the judgment of the Magistrate. Upon a review of his report and the record as a whole, I agree with his recommendation.

Defendant's motion to dismiss, pursuant to Fed. R. Civ. P. 41(b), is granted.

It is so ordered.

June 6, 1974

U.S.D.J.

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NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

-----X

MARINO LIEGGI,

Plaintiff,

against

REEDER-UNION AG,

Defendant.

-----X

SIRS:

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the United States Court of Appeals for the Second Circuit from so much and such parts of the Order of the Honorable Murray I. Gurfein, United States District Judge, filed on the 7th day of June, 1974 as grants defendant's motion dismissing plaintiff's complaint, pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure.

NOTICE OF APPEAL

PLEASE TAKE FURTHER NOTICE that the plaintiff hereby appeals from each and every part of the aforesaid Order and from the whole thereof, both upon the facts and upon the law.

DATED: New York, New York
July 1, 1974

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff

By
A Member of the Firm
160 Broadway
New York, New York 10038

TO:

BURLINGHAM UNDERWOOD & LORD
Attorneys for Defendant
25 Broadway
New York, New York 10004

Services of three (3) copies of
the within Appendix is
hereby admitted this 10th day
of September, 1974

Burlingham Underwood +
Attorney for Defendant. Jord/hg